IN THE

Supreme Court of the United States

October Term, 1958
No. 157

LEWIS M. STEVENS, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania,

Appellants

vs.

J. K. CREASY, WILLIAM W. McNAMEE, FRANK RANALLO, A. W. TUCCILLO, ED KLEEMAN and R. G. CUMMISKEY, on Behalf of Themselves and Other Property Owners and Lessees Similarly Situated, and JACK C. MARSHELL and ALICE E. MARSHELL,

Appellees

On Appeal from the United States District Court for the Western District of Pennsylvania.

BRIEF FOR APPELLANTS

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On Appeal From the United States District Court for the Western District of Pennsylvania.

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court (R. 85-104) is reported at 160 F. Supp. 404.

JURISDICTION

These actions were brought to have the Pennsylvania Limited Access Highways Act declared unconsti-

tutional and to enjoin appellants from enforcing t
statute as to appellees. They were heard and det
mined by a three-judge district court in accorda
with 28 U.S.C. §§2281 and 2284. The final decree
the District Court was entered on March 19, 1958 (
104). The notice of appeal was filed on May 9, 19
(R. 105-8). Probable jurisdiction was noted on Oc
ber 13, 1958 (R. 108). The jurisdiction of this Co
rests on 28 U.S.C. §§1253 and 2101(b).

STATUTE INVOLVED

The statute involved is the Pennsylvania Limited Access Highways Act of May 29, 1945. It may be found in the 1945 volume of the Pennsylvania Pamphlet Laws at pages 1108 to 1112 with amendments in the 1947 volume at pages 481 to 483 and the 1957 volume at page 234. It may also be found in Title 36 of Purdon's Pennsylvania Statutes Annotated (Pocket Part) §§2391.1 to 2391.15. The entire statute is set forth in Appendix A hereto. Section 8 of the act, which was specifically challenged by appellees (R. 12-13) and found unconstitutional by the court below (R. 99-101), reads as follows:

"For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway

or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the authorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivision in which such highway is located."

QUESTIONS PRESENTED

1. Did the district court err in exercising its equitable jurisdiction on the ground that otherwise appellees would suffer irreparable injury, where the injury relied upon would stem from appellants' proposed action which the district court conceded to be valid and where the state courts previously had affirmed the availability of a recognized statutory proceeding in which appellees' rights could be determined and protected?

2. Did the district court err in enjoining enforcement of all provisions of a Pennsylvania statute which authorizes the limiting of access to a public highway on the ground that it precludes the payment of damages to abutting property owners, where the highest court of Pennsylvania had previously held that the statute provides both a means and a right to recover whatever damages an abutting property owner is constitutionally entitled to receive?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting landowner or tenant, where no land is taken, for his loss of access resultant from the conversion of an unlimited access highway to a limited access highway?

4. Does a Pennsylvania statute providing for the limiting of access to a public highway, without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting landowner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

STATEMENT OF THE CASE

On August 1, 1955, and subsequently, appellees filed, in the United States District Court for the Western District of Pennsylvania, complaints (R. 10-15) seeking equitable relief against appellants. Jurisdiction was based on 28 U.S.C. §1331. Specifically, it was alleged that appellants were about to designate the "Airport Parkway," a public highway in Allegheny County, Pennsylvania, a limited access highway (the effect of which would be to limit ingress and egress to, from and across the highway to points specifically designated by appellant Secretary of Highways); that such designation would deprive appellees, who were abutting property owners and tenants, of their access to the highway; that the designation of limited access would be made under authority of the Pennsylvania Limited Access Highways Act of 1945 which precluded the payment of damages by the Commonwealth where no property was taken; that no damages would be paid to appellees for their loss of access since none of their land was being taken; and that, therefore, the statute was repugnant to the Constitution of the United States. Alleging that such action would cause them irreparable injury, appellees prayed for injunctive relief and for a decree that the Pennsylvania statute was unconstitutional.

Simultaneously with the filing of their complaint, appellees moved for and were granted, ex parte, a temporary restraining order. Thereafter, a three-

judge court was duly convened in accordance with 28 U.S.C. §§2281 and 2284. The initial proceedings resulted in stipulations as to the facts. Believing, however, that a construction of the statute by the state courts was desirable, the district court then entered an order staying proceedings pending such a determination and continuing the temporary restraining order (R. 66-68).

Pursuant thereto, appellees sought equitable relief from the state courts. Such relief was refused on the ground that, under the challenged statute, appellees had an adequate remedy at law by which all their rights would be protected (R. 71-74). Thereafter, the district court, finding that irreparable injury would be suffered by appellees during the time necessary to litigate the constitutionality of the statute in the state courts, granted a permanent injunction. The district court held that the enjoyment of access is a property right, that the deprivation of such access constitutes a taking of property for which compensation must constitutionally be paid, that the Pennsylvania statute does not provide for such compensation and that, accordingly, the act is in contravention of the due process clause of the Fourteenth Amendment to the United States Constitution (R. 84-94). This appeal followed.

SUMMARY OF ARGUMENT

Appellants here contend that the district court erred in determining that its exercise of equitable jurisdiction was necessary to prevent irreparable loss, in construing a state statute contrary to the definitive construction theretofore rendered by the highest state court, in refusing to sever what it found to be the single unconstitutional provision from the concededly valid remainder of the statute, in concluding that an abutter's enjoyment of access to a modern highway is superior to the public's right to the fullest utilization of that highway, and in holding that the limiting of such access by governmental regulation constitutes a taking for which the Fourteenth Amendment requires the payment of damages.

Appellants have never questioned, and do not now, question the jurisdiction of the lower court. They only question whether this case presents an appropriate occasion for the exercise of that jurisdiction. The irreparable loss which is prerequisite to its exercise cannot exist in a vacuum; it must be related to and flow directly from action under an invalid statutory provision. The loss which the district court here found—the frustration of commercial opportunities—does not stem from the compensation provision which the court held to be constitutionally inadequate. It results from the limiting of access, an action which the district court conceded to be constitutional.

Furthermore, in basing the irreparability of appellees' loss on the time that would be consumed in litigating the constitutionality of the statute in the state courts, the district court ignored the fact that the constitutionality of the statute had already been established in state litigation between the parties to this case. Although the state courts in that equity action had no jurisdiction to pass upon the breadth of the compensation requirements of the federal and state constitutions, they clearly held that the statute afforded appellees both a procedural remedy by which they could test their right to damages and a substantive right to recover such damages as they might be constitutionally entitled to receive. Thereafter, the district court erroneously equated the existence of an uninterpreted constitutional requirement as to damages with the existence of an uninterpreted statute.

The state courts' decision that appellees' constitutional right to damages was fully guaranteed by the statute was binding upon the district court. Nevertheless, that court went off on an excursion of its own by interpreting the statute contrary to the authoritative state court interpretation. If the district court were correct in concluding that the Constitution requires Pennsylvania to compensate appellees for their loss of highway access, this statute, as construed by the state courts, likewise requires payment of such compensation. The district court's holding that this statute precludes payment to appellees of what is constitutionally required is thus in direct conflict with the binding construction rendered by the highest state court.

Notwithstanding its recognition that appellants could constitutionally limit access to the highway, the district court enjoined enforcement, as to appellees, of the entire statute. No justification for this action exists because this statute, as well as the Constitution of Pennsylvania, guarantees appellees payment of damages arising from a taking of their property for public use and, further, because the statute contains an express severability clause which has not been held inoperative by any state court.

Completely apart from considerations governing federal equity jurisdiction and general principles of comity, firmly established principles delineating the scope of the police powers of a state should have determined the instant case in favor of appellants. The authorities point clearly to the conclusion that impairment of road access by governmental regulation, like the accomplishment of a similar result through change of highway grade or interposition of physical obstruction, does not give rise to a valid claim to damages. Rights of access stem historically from conditions which do not obtain here; and, consequently, they properly belong outside the field of constitutionally compensable property interests.

Moreover, the district court's holding that access is a constitutionally protected property right treats all appellees as being landlocked by the proposed action. The court thus overlooks the statutory provision authorizing the establishment of local service roads to afford access to abutting property owners who would otherwise be without access. The impossibility of determining the actual effect which the limiting of

access would have upon the various appellees, together with the additional fact that Pennsylvania traditionally has retained a six percent interest in all land in the state for road purposes, re-emphasizes the desirability of relegating appellees to the statutory proceeding.

The statute in question does not purport to deny liability where property is taken. It merely provides that compensation shall not be paid for consequential loss in the absence of a taking of property. Under the decisions of this Court, the denial of damages for consequential loss does not subject the statute to constitutional objection. If the district court were correct in holding that the limiting of appellees' highway access constitutes a taking of property, this statute on its face requires the payment of damages therefor; and the interpretation given to the statute by the state courts in no way derogates from this obvious meaning.

Although appellees raised issues of estoppel, equal protection of the laws and impairment of the obligations of contract, the district court did not see fit to discuss these issues. We submit that the state cannot be estopped in the exercise of a governmental function and that the valid exercise here of the state's police power does not deny appellees the equal protection of the laws or impair their obligations of contract.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DECLINED TO EXERCISE ITS JURISDICTION HERE BECAUSE THE IRREPARABLE INJURY WHICH IT FOUND WAS NOT RELATED TO THE STATUTORY PROVISION HELD UNCONSTITUTIONAL AND BECAUSE THE STATE COURTS PREVIOUSLY HAD AFFIRMED THE AVAILABILITY OF A RECOGNIZED STATUTORY PROCEEDING IN WHICH APPELLEES' RIGHTS COULD BE DETERMINED AND PROTECTED

Appellants do not contest the jurisdiction of the district court. Their position is well summarized in the words of this Court in *Burford v. Sun Oil Co.*, 319 U. S. 315, 318 (1943):

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

The answer to this question depends on a multitude of factors impossible to delineate in a fashion generally applicable to every case in which the constitutionality of a state statute is challenged by a prayer for equitable relief addressed to a federal district

court.[1] The case at bar presents several complex aspects which should be outlined initially.

First, although the initial complaint might fairly be viewed as contesting appellants' right to deprive them of access to the highway, whether or not damages were paid, appellees clearly abandoned this broad assertion (Certified Record, Transcript of Pretrial Hearing of December 2, 1955, pp. 21, 100-102)[2]; and the district court recognized the validity of state action to limit highway access (R. 94). In the district court's view the questions were simply whether the Fourteenth Amendment required damages to be paid to appellees for their loss of access and, if so, whether the statute comported with such a requirement. Thus, the state's power to construct or designate limited access highways is unquestioned; and nothing in the statute granting such power was held invalid.

Second, the holding of unconstitutionality involved two-step reasoning: (a) the deprivation of access to a highway is a "taking" of property in the constitutional sense for which compensation must be paid (R. 96); and (b) the Pennsylvania General Assembly intended the word "property" in §8 of the statute to mean "land" and did not intend to provide for compensation where no land was taken (R. 99-100).

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[1] At least one attempt has been made to isolate these factors from the cases in which this issue arose. See Hart & Wechsler, *The Federal Courts and the Federal System*, 885 (1953).

[2] The parties have filed with the Clerk of this Court a stipulation permitting reference to unprinted portions of the Certified Record.

The statute's language, granting damages only for an actual taking of property and denying liability for consequential damages where no property is taken, is unexceptionable on its face; thus the above interpretation of the statute was prerequisite to the district court's conclusion.

Third, the requisite irreparable injury was premised upon the findings that, if access were limited, appellees' established businesses would be forced to close, some appellees would be unable to make any practical use of their lands because all access would be lost and some appellees would be deprived of opportunities to negotiate successfully sales or leases of their properties for commercial uses (R. 90). A refusal to exercise jurisdiction, stated the district court, would cause appellees to suffer substantial and, possibly, unrecoupable losses during the time it would take to litigate the constitutionality of the statute in the state courts (R. 91). Nowhere, however, does the district court discuss the fact that these results would occur even if the statute provided for the payment of damages for appellees' loss of access and fully comported with the district court's view of the compensation requirements of the Constitution.

Fourth, although recognizing that a federal court should be reluctant to exercise jurisdiction where plaintiff's constitutional rights will be properly protected in the state courts and where the state statute has not been construed by the state judiciary, the district court, nevertheless, here determined to exercise its jurisdiction. It assigned as its reason that appellants would be irreparably injured during the

time necessary to litigate the constitutional issue in the state courts. In so doing, the district court, surprisingly enough, failed to note the fact that, at its own instance, the constitutionality of this very statute had already been litigated in the state court proceeding between the very parties to this action, with the result that the constitutionality of the legislation had already been upheld by the highest state court. When the parties then returned to the district court, the sole constitutional issue before the court was whether the statute, in guaranteeing the property owners a means of litigating their claims to damages and of obtaining such damages as they might be constitutionally entitled to receive, comported with the requirements of the Federal Constitution.[3] Consequently, the applicability of the principle invoked to the actual facts may be seriously questioned.

Fifth, despite a specific severability provision in the statute (§15) and the general severability requirement of Pennsylvania's Statutory Construction Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. §555, the district court struck down the entire statute because it believed that the act failed to provide a method for appellees to receive compensation (R. 100-1).

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[3]The extent of the district court's action becomes even more difficult to understand if reference is made to the certified Record, Transcript of Pre-trial Hearing of February 13, 1956, where in five separate places (pp. 17, 18, 23, 32-a and 33) Circuit Judge Staley said that, if the Pennsylvania statute was interpreted by the state courts so as to provide a remedy by which plaintiffs could test their right to damages in the state courts, the statute was constitutional and the federal court had no further jurisdiction.

Even though no dispute as to the Commonwealth's right to limit access exists, the result of this approach by the district court has been to prevent the Commonwealth of Pennsylvania from limiting access to the highway, and thus affording the public the advantages therefrom, for more than three years. This anomalous result is itself indicative of the error in the result reached by the district court.

As this Court has held, a showing of irreparable injury is necessary before a federal court will restrain enforcement of a state statute: *American Federation of Labor v. Watson*, 327 U. S. 582, 593 (1946); *Toomer v. Witsell*, 334 U. S. 385, 391 (1948). The district court apparently agreed with this view, but proceeded to find irreparable injury in a totally unique way. Its finding on this point is found in the following excerpt from its opinion: (R. 90-1)

> "We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer v. Witsell et al.* 334 U. S. 385 (1948). If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all like

lihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses dependent on the continued right of access would be deprived of an opportunity to realize a successful completition [sic] of the negotiations.

"Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

"Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer v. Witsell*, supra, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities,

§9 of the statute, 36 Purdon's Pa. Stat. Ann., §2391.9."

Does *Toomer v. Witsell* support the position of the district court, or does it support the contrary conclusion urged by appellants? In that case an action was brought to enjoin as unconstitutional the enforcement of several South Carolina statutes which regulated commercial shrimp fishing off the coast of the state. One statute required non-resident shrimp boat owners to pay a license fee one hundred times the amount required of resident shrimp boat owners. Another required all licensed boats to dock at a port in the state and to unload, pack and stamp their catch before transporting it out of the state. Still a third conditioned the issuance of non-resident licenses on submission of proof that state income taxes had been paid on all profits from operations in the state during the preceding year. 334 U. S. 385, 389-91.

This Court noted that compliance with the first two statutes would require payment of large sums of money for which the state provided no means of recovery, that defiance would carry the risk of heavy fine and long imprisonment and that withdrawal from fishing until a test case was taken through the state courts (and possibly to this Court) would have resulted in a substantial loss of business for which no recompense could be obtained by the fish boat owners. As to the income tax statute, however, this Court found that no irreparable injury or lack of adequate remedy at law existed since the state provided a procedure whereby taxes paid under protest could be recovered and since no showing was made that the boat

owners' constitutional objections to the tax could not be raised under that procedure. 334 U. S. 385, 391-92.

The losses which the statute would have inflicted upon the boat owners in *Toomer v. Witsell* were all losses flowing from the application of the very statutory provisions which this Court held invalid. In contrast the losses which the district court found appellees in the present case would suffer are all losses which flow from the concededly valid application of state power to limit access. None of appellees' losses arise from the alleged denial of damages under §8 of the act. Were the statute to provide explicitly for the payment of damages to the present appellees, the injuries foreseen by the district court would still occur; yet, the total validity of the statute would then have been recognized by the district court; and the appellees would have been denied relief.

Despite the district court's apparent contrary interpretation in the case at bar, the gist of this Court's decision upholding the exercise of equitable powers in the *Toomer* case does not stem from a conclusion that relegation to the state tribunals to try the constitutionality of the statute would have subjected appellees there to irreparable harm. Admittedly, the appellees here could not proceed before a board of viewers prior to the limiting of access by the Commonwealth; but this kind of delay in providing for payment of any damages to which appellees may be entitled does not affect the statute's constitutionality. *Bailey v. Anderson*, 326 U. S. 203 (1945); *Joslin Manufacturing Company v. City of Providence*, 262 U. S. 668, 677 (1923); *Sweet v. Rechel*, 159 U. S. 380, 400-407 (1895).

The nub of the decision in favor of the exercise of equitable power in the *Toomer* case was that the irreparable injury flowed directly from the application of invalid statutory provisions. The suggestions that the complainants withdraw from fishing until a test case could be taken through the state courts clearly could not prevail where the loss of business could not be recouped were the statute to be held unconstitutional. The loss there arose directly from the invalidity alleged; the losses here would arise only as an incident of valid state action.

Had the district court held that the actual limiting of access here is beyond the power of the state, the problem presented would be entirely different. The irreparable injury would then arise from the invalid state action, and equitable relief would be proper. In such instance the principle of *Toomer v. Witsell* could properly be invoked to suport the exercise of equitable jurisdiction. The district court did not so hold; in fact, it agreed (R. 94) that the limiting of access is valid. This holding, appellants submit, precludes the granting of an injunction against doing what the district court concedes may be done.

Logical application of the *Toomer* case supports appellants' position. The declination of equitable jurisdiction as to the income tax statute presents an issue similar to the one here. Both statutes allegedly would deprive the complainants invalidly of their property: the one by requiring payment of money to the state, the other by withholding payment of money by the state. Both provide a method for obtaining money from the state: the one by a suit for a refund, the other by a suit for damages. In both the right of

e claimant to receive the money may be disputed by e state. With regard to the statute in *Toomer*, this ourt said:

> "In the absence of any showing by appellants that they could not take advantage of this procedure to raise their constitutional objections to the tax, we cannot say that they do not have an adequate remedy at law." 334 U. S. 385, 392.

o such showing has been made by appellees here ither. In fact, the availability of the state statutory roceeding is so clear (R. 71-4) that no such showing ould be made.[4]

In addition, the district court adverted to §9 of he Pennsylvania statute to support its decision to xercise jurisdiction. It compared this provision with his Court's reference in *Toomer v. Witsell* to the act that the boat owners would risk long imprisonent and heavy fine for defiance of the statute under ttack in that case. Section 9 of the Pennsylvania ct is manifestly no more than a traffic control regu-

[4] In fairness appellants point out that the existence of an dequate remedy at law has been held to refer to the istence of a federal remedy at law. DiGiovanni v. amden Fire Insurance Association, 296 U. S. 64, 69 (1935). nlimited application of this principle has been criticized, eckwood, Maw and Rosenberry, *The Use of the Federal njunction In Constitutional Litigation*, 43 Harv. L. Rev. 6, 454 (1930); Toomer v. Witsell, 334 U. S. 385 (1948), nd Alabama Public Service Commission v. Soutnern ailway Co., 341 U. S. 341 (1951), appear contrary to such nlimited application; and the district court in this case itially felt that existence of a state statutory proceeding ould obviate the need for federal court interference (Cerfied Record, Transcript of Pre-Trial Hearing of February 3, 1956, pp. 17, 18, 23, 32-a and 33).

lation. It applies to all persons who violate regulations for the use of limited access highways, not just to the abutting property owners; and it provides for a fine of five to twenty-five dollars or one day's imprisonment for each dollar of unpaid fine. This hardly bears comparison with the statute in the *Toomer* case either in kind or in degree. That statute's penal sanctions applied directly to the activities which the Court held were invalidly regulated, while here the penalizing of an access violation simply enforces what the district court itself held to be valid action.

Toomer v. Witsell sets forth minimum requirements which must be met in order to justify the exercise of federal equity jurisdiction. First, the injury must flow from the state action held to be invalid. The above discussion demonstrates that any injury which appellees would suffer does not stem from what the district court held to be the constitutionally deficient provision of the statute. Second, there must be no adequate remedy at law. The district court predicated its exercise of equitable jurisdiction upon the finding that "... plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts..." (R. 91). At the district court's own behest the constitutionality of the statute had already been litigated in the state courts, with the result that its constitutionality had been made clear by the state court's affirmance of the availability of a recognized statutory proceeding in which appellees' rights could be determined and protected. Thus, the district court's basis for exercising its jurisdiction rests upon a fallacious assumption.

Quite apart from these considerations, principles of comity recognized by this Court are pertinent here. *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341 (1951); *Railroad Commission of Texas v. Pullman Company*, 312 U. S. 496 (1941); *Massachusetts State Grange v. Benton*, 272 U. S. 525 (1926). Appellants believe that these principles, viewed in light of the fact that we are here dealing with a complex substantive issue more amenable to adjudication in a state forum, additionally compel the conclusion that the district court erred in here exercising its jurisdiction.

II. THE DISTRICT COURT, BASING ITS ACTION UPON AN INTERPRETATION OF THE PENNSYLVANIA STATUTE CONTRARY TO THE INTERPRETATION OF THE HIGHEST STATE COURT, ERRED IN ENJOINING ENFORCEMENT OF ALL PROVISIONS OF THE STATUTE

A. The District Court Improperly Construed the State Statute Contrary to the Construction of the Highest State Court

The most singular feature of the instant case is that the district court, after staying proceedings before it and remitting the parties to the state courts for a definitive construction of the statute (R. 66-8), proceeded thereafter to interpret the statute without regard to the state proceedings and the statutory interpretation had therein. Because the procedure followed and the result obtained is so important here, a somewhat detailed resume is in order.

Recognizing initially that no interpretation of the questioned statutory provisions had ever been rendered by the state courts, the district court explored with the parties the possibility of retaining jurisdiction while an action was brought in the state courts (Certified Record, Transcripts of Pretrial Conferences, December 2, 1955, pp. 102-5, 128-133, and February 13, 1956). Both parties indicated to the court their conviction that the state courts would hold

that since the statute provided for a proceeding at law (i.e. before viewers, etc.), an action in equity would not lie (Certified Record, Transcript of Pretrial Conference, February 13, 1956, pp. 19, 22, 23). Circuit Judge Staley, however, expressed the view that, were the statute held to provide a legal remedy by which appellees' rights could be determined and, if existent, measured, the statute would clearly be constitutional and the federal action would be dismissed. (Certified Record, Trancript of Pretrial Conferences, December 2, 1955, p. 115, and February 13, 1956, pp. 17, 18, 23, 32-a and 33).

Thereupon, an action in equity in the state courts was begun by appellees. Just as the parties had foreseen, the lower state court dismissed the complaint (R. 71-4), 8 Pa. D. & C. 2d 535 (1956). The reasoning of the opinion of that court is so vital to a determination of the issue now presented that it bears verbatim quotation:

> "The plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation of authority to support it. At all times the plaintiffs can rely on the provisions of the Constitution of Pennsylvania, Article I, Section 10, that no private property shall be taken or applied to public use 'without just compensation being first made or secured.' Neither do the plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. The plaintiffs' main

attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway without compensation. What the property owners here are asking this Court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is constitutionally required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of the plaintiffs' rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P.S. 2391.8.

"The Supreme Court of Pennsylvania has made it indisputably clear that a Pennsylvania Court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See Gardner v. Allegheny County, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the Legislature, in The Limited Access Highways Act, supra, has provided a way in which every property owner may have it decided whether he is entitled to compensation, and, if so, when, for what, and in what amounts. Where the Legislature has provided a way and a remedy, it becomes the exclusive remedy available; Hasting's Appeal, 374 Pa. 120 (1953); Section 13 of the Act of March 21, 1806,

P. L. 558, 4 Sm. L. 326, 46 P.S. 156. For a late case see Jacobs v. Fetzer, 381 Pa. 262 (1955).

"It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then at that time plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the Common Pleas Court and a jury trial, and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, whatever they may be, will be guarded and protected." (R. 73-4)

The Pennsylvania court thus held (1) that appellees had available to them under the Limited Access Highways Act the usual and accepted statutory remedy before a board of viewers with subsequent rights of appeal and (2) that in such statutory proceeding any constitutional right to damages which appellees might have would be fully protected and secured. But because a Pennsylvania court sitting in equity had no jurisdiction to determine appellees' constitutional right to damages when an adequate statutory proceeding was available, the action was dismissed.

On appeal the Supreme Court of Pennsylvania affirmed per curiam, adopting as its own the lower

court's opinion (R. 77). 389 Pa. 635, 133 A. 2d 178 (1957).[5]

Despite this unequivocal language in the state courts' opinion, both the appellees and the district court felt that a definitive construction of the state statute had not been obtained (R. 76, 77, 87). Both indicated that failure of the state courts to determine the substantive compensation issue somehow justified further and final action by the district court. Both erred in their analysis of the state proceeding.

First, neither the district court nor appellees have taken the position that a state requirement that one's right to damages be determined in a statutory proceeding rather than in equity violates any constitutional guarantee. Second, the state courts' interpretation of the statute makes it clear that such a statutory proceeding is available to appellees. Third, the state courts' interpretation also makes it clear that appellees' constitutional right to damages is fully protected by the statute. This holding might be aphorized thus: the Constitution is the measure of the statute. The only unanswered question after the state courts' decision was whether the Constitution requires damages to be paid to appellees.

Appellants recognize that in a state statutory proceeding the state courts might hold that appellees have no constitutional right to damages. Such a decision, however, cannot affect the constitutionality of the

[5]More recently, the Pennsylvania Supreme Court, in Gardner v. Allegheny County, 393 Pa. 120 (1958), reaffirmed the doctrine that a court of equity could not determine whether a taking of property had occurred or the amount of damages resulting therefrom.

statute itself; it involves only an interpretation of the Constitution and would, of course, be reviewable by this Court. A reversal by this Court of such determination would not affect the statute since, as the state courts have held, the statute provides for the payment of damages if the Constitution requires such payment.

The decision of the district court failed to recognize this vital distinction between an unanswered constitutional question and an uninterpreted statute. Existence of the unanswered constitutional question could not justify the district court in undertaking an independent interpretation of the Pennsylvania statute. Furthermore, this is not a case like *Government and Civic Employees Organizing Committee CIO v. Windsor*, 353 U. S. 364 (1957), where the constitutional question was neither presented to nor passed upon by the state courts.

As noted, the state courts here held that the breadth of the statute is measured by the protection of the Constitution, the statutory compensation requirement being as broad as, but no broader than, that of the Constitution itself. In holding that the Pennsylvania statute does not provide for compensation for what the district court regarded as the taking of a property right, the district court has given the statute an interpretation which clearly conflicts with that of the state judiciary. If the limiting of highway access, unaccompanied by an appropriation of land, really does constitute the taking of a property right, then, according to the state courts, the statute guarantees compensation therefor. The contrary decision of the district court, in effect, overrules the Supreme Court

of Pennsylvania in the latter's construction of the state statute. This construction is binding on the federal courts. *Albertson v. Mullard*, 345 U. S. 242, 244 (1953); *Aero Mayflower Transit Co. v. Commissioners*, 332 U.S. 495, 499-500 (1947).

Appellees, in their Motion To Affirm (p. 10), cite *Doud v. Hodge*, 350 U. S. 485 (1956), to support the district court's right and duty to construe a state statute even where the state courts have not construed it. Citation of that case for such a principle is most dubious. In *Doud* this Court simply held that it was error for a district court to dismiss a complaint for *lack of jurisdiction* on the ground that the state courts had not rendered a definitive interpretation. It concluded:

> "We do not decide what procedures the District Court should follow on remand." 350 U. S. 485, 487.

Upon remand the district court considered the issue on the merits and did hold the Illinois statute in question unconstitutional, a holding subsequently affirmed by this Court. *Morey v. Doud*, 354 U. S. 457 (1957). In doing so, the federal courts did not presume to differ, in their construction of the Illinois statute, with the construction previously rendered by the Supreme Court of Illinois (which had upheld the statute's constitutionality against a similar attack). Thus, the federal courts there differed with the state courts only as to the import of the Federal Constitution and not, as in the case at bar, as to the meaning of the state statute.

3. The District Court Improperly Refused To Sever the Provision Held To Be Unconstitutional From the Remainder of the Act

After conceding that the appellants could validly limit access to the highway and that this kind of regulation constituted a proper exercise of state power (R. 94), the district court struck down the entire statute because, according to it, no provision was included by which appellees could be compensated for their losses, a defect which the district court regarded as fatal to the entire statute (R. 100-1). Its exact language follows:

> "The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a 'severability clause' (§15, 36 Purdon's Pa. Stat. Ann., § 2391.15). However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account."

Three objections may be made to this refusal to sever. First, if the district court meant that the statute contains no provision granting appellees a procedural remedy by which they could recover whatever compensation they are entitled to, its conclusion was clearly in conflict with the binding state court holding (R. 73-4). Even absent this state court interpreta-

tion, general Pennsylvania law would provide a remedy.[6]

Second, if the district court meant that, even though the statute provided a procedural remedy, it failed to guarantee the payment of such damages as appellees are constitutionally entitled to, it again reached a conclusion contrary to the binding state court determination (R. 73-4). Moreover, appellants point out that under Article I, §10, of the Constitution of Pennsylvania, just compensation must be paid when private property is taken for public use. Absent any language at all in the statute regarding payment of damages, appellees, as the state courts unequivocally pointed out (R. 73), can rely on this state constitutional guarantee in the statutory proceeding.

Third, the strict principle set down by the Court in *Watson v. Buck*, 313 U. S. 387 (1941), and *Dorchy v. State of Kansas*, 264 U. S. 286 (1924), concerning severability was violated by the district court's action. The statute questioned here contains an express severability clause in §15. In addition Pennsylvania has a general severability requirement in §55 of its Statutory Construction Act of May 28, 1937, Pamphlet Laws, page 1019, 46 Pa. Stat. Ann. §555. The logic and reason behind the requirement that severability be recognized is well illustrated by the present case for, as has already been noted, absence of the invalid provisions would not harm the appellees. The district court's refusal to sever the invalid pro-

[6] See Smedley v. Erwin, 51 Pa. 445 (1866). See also United States v. Causby, 328 U. S. 256, 267 (1946); and Kohl v. United States, 91 U. S. 367 (1876).

visions from the remainder of the statute, in the face of this specific legislative intent to the contrary, and in the absence of a contrary ruling by the state courts,[7] ignores the principle set down by this Court.

[7] See Morey v. Doud, 354 U. S. 457 (1957).

III. THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE PENNSYLVANIA TO COMPENSATE AN ABUTTING LANDOWNER OR TENANT, WHERE NO LAND IS TAKEN, FOR HIS LOSS OF ACCESS RESULTANT FROM THE CONVERSION OF AN UNLIMITED ACCESS HIGHWAY TO A LIMITED ACCESS HIGHWAY

A. To Prevail, Appellees Must Establish That an Abutter's Enjoyment of Unlimited Highway Access Is a Property Right and That the Restriction Thereof by Governmental Regulation Constitutes a "Taking" in the Constitutional Sense

Let it be assumed *arguendo* that the case at bar can not be decided without resolving the question of compensability, under the United States Constitution, of loss arising from restriction, by the state, of access to a public highway. It is respectfully submitted that the Constitution here imposes no requirement of payment.

Under the statute in question limitation of highway access could occur in any one of three ways: (1) simultaneously with the construction of a new road, (2) to an existing road accompanied by the taking of some land of abutting owners, or (3) to an existing road without the taking of any abutting land. The present case involves only the third situation.

Although the constitutions of many states require the payment of compensation where property is dam-

aged or injured, even though not taken, other constitutions, including those of the United States and Pennsylvania, require compensation to be paid by the sovereign only where property is taken.[8] Under the United States and Pennsylvania constitutions, an abutting landowner's right to compensation, in the third situation referred to above, is dependent upon his showing, first, that his enjoyment of unlimited access to a public highway is a property right and, second, that restriction thereof by governmental regulation constitutes a "taking" in the constitutional sense.

Appellants recognize and acknowledge that, although "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety," *Chicago B. & Q. Railway Company v.*

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[8] Reese, *Legal Aspects of Limiting Highway Access*, National Academy of Sciences, National Research Council, Highway Research Board Bulletin 77 (1953), p. 38, n. 23, lists the "taking" states as follows: Alabama (except as to particular governmental or private agencies), Connecticut, Delaware, Florida, Idaho, Iowa, Indiana, Kansas, Maine, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina (by judicial decision), Ohio, Oregon, Pennsylvania (except as to particular governmental or private agencies), Rhode Island, Tennessee, Vermont, and Wisconsin. The same source, p. 44, n. 75, catalogs the "damage" or "injury" states as follows: Alabama (as to municipalities and private entities), Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Massachusetts (by statute), Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania (as to municipalities and private entities), South Carolina (by judicial decision), South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

Illinois ex rel. Drainage Comm'rs., 200 U.S. 561, 592 (1906), there are instances in which the form of regulation so diminishes the value of property as to constitute a taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); cf. *U. S. v. Causby*, 328 U.S. 256 (1946); *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958). Equal validity, however, adheres in the co-ordinate principle that a right to compensation does not arise merely because governmental regulation deprives an owner of the most profitable use of his property. See *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946).

The nature of the issue at bar compels an examination of the problem from the standpoint of the conflicting interests here at play. Is the loss which, admittedly, will be inflicted upon the abutting owners one which should be borne by them alone; or is it one properly to be shared by the public as a whole? "Traditionally [this Court has] treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." *U. S. v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

B. Appellee's Enjoyment of Unlimited Highway Access Is Not a Property Right

1. An abutter's right of access does not exist as against the right of the public to the most efficient use of a public road for public travel.

The issue of whether an abutting owner has a right of access is one which cannot be determined in the

abstract. Certainly, in the absence of governmental regulation, everyone has the right to enter and leave a highway at whatever point he desires, as long as he does not commit a private trespass; thus, in a sense, everyone has a right of access. Perhaps an abutter further has a special right of access as against any use of the highway for non-highway purposes. It does not follow, however, that the abutter possesses a special right of access as against the right of the public to use the road most efficiently for the very purpose for which the road was constructed—the facilitation of public travel. This distinction is recognized and expounded upon in *Sauer v. City of New York*, 206 U.S. 536, 542-3 (1906). See 2 Nichols, *Eminent Domain* (3rd Ed.), §6.444, pp. 361-2.

A study of the origin of the legal principle of "right of access" reveals that traditionally the law has determined rights of abutting owners by seeking to discover the purpose of the road or highway upon which their properties abut. Wilkie Cunnyngham, in *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19 (1948), an article which the district court regarded as authoritative (R. 94), traces the development of the right of access concept from the horse and cart days of early English and colonial history, when neighboring landowners cleared passageways through woods and fields so that they could haul produce to nearby villages. It was taken for granted that, having contributed the construction and maintenance labor, the abutting landowner should have a right of access to "his" road at any place he desired. From this common understanding and common custom sprang the common law. The right, then,

apparently arose out of the basic purpose for which nearly all highways and streets, until modern times, were constructed—to afford ready access to the lands over and beside which they ran. Obviously, this purpose could hardly be accomplished without a right of ingress and egress in abutting landowners. See also, Moody, *Condemnation of Land for Highway or Expressway*, 33 Texas L. Rev. 357, 365-366 (1955); *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298 (1951).

All three articles cited above point out that, with the development of highways designed primarily as arteries for the expeditious flow of traffic between major termini, the traditional reasoning can no longer be applied to all roads and highways. Certainly a highway such as that involved in this case is not a land service road, but rather a traffic service road. Today, the abutting owners, as such, contribute nothing to the locating, designing, constructing, and maintaining of a highway. Today, the significant question is whether the "right of access" of the abutting landowners ever comes into existence.

Where roads are designed primarily to serve the needs of landowners in the immediate vicinity, it may be entirely proper to hold that these landowners have a special right of access thereto. Where, however, a road has been constructed not primarily for local service, but rather for the furnishing of a safer and more efficient mode of travel between distant points, the abutting property owners should have no greater right than that vested in the public at large. As a matter of abstract justice such an abutter should have no

more right of access to a highway right-of-way than an abutter would have to a railroad right-of-way. Since the purpose of highways like the one involved in this case is not merely to serve the local needs of a particular community or landowner, the reasons which gave rise to the granting of a special right no longer exist. The disappearance of these reasons should be accompanied by a commensurate diminution or elimination of the right of access.

An example of the current trend in limiting the right of access is the decision of the Supreme Court of Missouri in *State v. Clevenger*, 365 Mo. 970, 291 S.W. 2d 57 (1956). More recently the New York Court of Appeals, in *Cities Service Oil Co. v. City of New York*, No 201, Nov. 21, 1958, 140 N.Y. L.J. No. 100, p. 11, specifically rejected the contention of an abutter, whose access was impeded by the municipality's establishment of a bus stop adjacent to his property, that the "right of ingress and egress is a paramount property right." The court answered, "On the contrary, it is the right of the public to the use of the streets which is 'absolute and paramount.'" Even in jurisdictions which hold that an abutting owner has a right of access to the general system of roads and highways, the right has been denied with respect to certain types of roads. See *State v. City of Toledo*, 75 Ohio App. 378, 62 N.E. 2d 256 (1944) (boulevards).

The district court's opinion correctly reveals that the status of rights of access in Pennsylvania is still amorphous. For example, the opinion first cites *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. 2d 842 (1938), to show that Pennsylvania courts regard ac-

cess as a property right and later cites *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 A. 309 (1932), and several other cases to show that the same courts deny compensation for obstruction of access by the state where there is no physical appropriation of property. Since a right is a right only to the extent that courts protect it as such, the extent to which Pennsylvania recognizes highway access as a property right remains unsettled.

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2. Any right of access which appellees may have can be conserved by the establishment of local service roads.

If it be assumed, nevertheless, that the owners of property abutting upon the highway involved in the instant case have a right of access, the question arises as to the extent of that right. The author of *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298 (1951), summarizes the extent of the right of access by concluding that an abutter has the right only to get from his property into a public thoroughfare and thence, in a reasonable manner, to the general system of streets and roads. Where the state, in establishing a limited-access highway, provides for the construction of local service roads by which abutting property owners may reach the highway, even though by a more circuitous route, there should be and is in law no denial of the right of access.

The difference between complete isolation of a tract of land, a situation which would present the strongest possible case for damages, and the availability of some access is geographically the difference between an is-

land and a peninsula. That the distinction is not without legal validity is evident from cases such as *Jones Beach Boulevard Estate, Inc. v. Moses*, 268 N.Y. 362, 197 N.E. 313 (1935), where an ordinance restricting "U" turns and left turns on a parkway was upheld as applied to an abutter who, in his deed conveying land for the original construction of the road, had expressly reserved several rights-of-way over the highway and who by reason of the ordinance was forced to drive in a southerly direction a distance of five miles before he could turn and proceed in a northerly direction towards the City of New York. The principle of the Jones Beach case was reaffirmed in *Gilmore v. State of New York*, 298 Misc. 427, 143 N.Y.S. 2d 873 (1955), where local service roads were held to satisfy the abutter's right of access. See *People ex rel. Department of Public Works v. Schultz Co.*, 123 C. A. 2d (Calif. App.) 925, 268 P. 2d 147 (1954); see also annotations at 43 A.L.R. 2d 1072.

Section 3 of the challenged statute authorizes the Secretary of Highways, in connection with the designation of a limited-access highway, to lay out or construct local service highways, which §1 defines as follows:

> "A local service highway is defined as a public highway either existing, or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway."

Since the Secretary is authorized to construct local service roads to provide the abutting owners here

with access to the proposed limited-access highway, the statute does not of itself eliminate the right of access.

The complexity of the problem as it touches the appellees can be appreciated by considering the differing effects which the contemplated state action may have upon the various members of their class. In some cases, the abutters may be completely landlocked;[9] in others, they may have access to local service roads; some abutters may enjoy access to other existing roads; and others may have access to points of ingress and egress established by the state under §1 of the act. Unfortunately, the district court proceeded upon the unwarranted and unsupported assumption that all the appellees would be landlocked. Thus, the court in its opinion (R. 94) declares: ". . . we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such." In support of this conclusion the opinion quotes *Carazalla v. Wisconsin*, 269 Wis. 593, 71 N.W. 2d 276 (1955), as holding that "compensation must be paid where the limitation of access results in a 'complete' blocking of all access from the land of the abutting owner." We submit that neither the Wisconsin decision nor the law review articles cited by the lower court support the view that damages must be paid in all instances, i.e., irrespective of whether the abutting owners are left with some means of ingress and egress to and from their properties.

The inability to determine at this time which of the appellees will be landlocked by the challenged state

[9] See Stipulation of Counsel (R. 45).

action re-emphasizes the desirability of relegating the appellees to the statutory proceeding. At that time every landowner or tenant abutting upon the road may press his claim for damages, not in the abstract, but with full knowledge of the exact effect of the state action upon him. In such a proceeding the rights of the property owners can be fully protected without sacrificing the rights of the state.

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3. Any property right which appellees may have is nevertheless subject to the Commonwealth's six percent reserve interest.

In any event a reserve interest held by the Commonwealth in appellees' properties is yet another reason for rejecting appellees' claim of access rights. In *Plank-Road Company v. Thomas*, 20 Pa. 91, 93-4 (1852), the Supreme Court of Pennsylvania declared:

> "So far as we know or believe, every grant of land within this Commonwealth, from the first settlement down to the present day, has contained an express reservation to the state, of six acres out of every hundred, for roads. The legislature may authorize the land so reserved to be used for its proper purposes without paying the value of it to the grantee, his heirs or assigns. The six percent belongs to the state, and she may constitutionally appropriate it to the use it was meant for."[10]

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[10] Accord: Workman v. Mifflin, 30 Pa. 362 (1858); Township of East Union v. Comrey, 100 Pa. 362 (1882). For an historical discussion of the six percent rule, see 35 Dick. L. Rev. 192 (1931).

As recently as 1920, the State Supreme Court, in *Harrington's Petition*, 266 Pa. 88, 90, 109 A. 791 (1920), admonished that, "In considering the subject of highways, it is always well to remember that land taken therefor is regarded a little differently from land taken for other public uses, inasmuch as in the original grant from the Commonwealth it was subject to six percent allowance for roads, and compensation for taking or injury was a matter of grace, not of right."

Although the district court regarded appellants' argument based on the foregoing authorities as "interesting" and "plausible" (R. 101), it refused to apply the principle there enunciated to the instant case because "we cannot believe that the original grantors ever envisaged limited access highways" (R. 101). By the same reasoning the interstate commerce clause of the Federal Constitution could not give Congress the right to regulate aviation or motor transportation.

Although this case presents a federal question, the problem of rights in real property is a matter upon which the state judiciary is deemed to speak conclusively.[11] See *Eldridge v. Trezevant*, 160 U.S. 452 (1896), where the State of Louisiana was held to have, for the construction of public levees on land abutting upon the Mississippi River, a servitude valid against the compensation claim of a property owner whose land was taken for construction of a levee. Is not this comparable to the interest of the Commonwealth of Pennsylvania in land necessary for road purposes?

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[11] See Fox River Paper Company v. Railroad Commission of Wisconsin, 274 U.S. 651 (1927); Suydam v. Williamson, 65 U.S. (24 How.) 427 (1861).

If Pennsylvania's right to use appellees' property for road purposes is superior to appellees' own interest therein, has not Pennsylvania, *a fortiori*, a superior right to use for essentially the same purpose any lesser interest which may adhere in the land?

Accordingly, even though the result may appear harsh, the Commonwealth, without compensating any of the appellees, may properly claim the interest here involved as part of its six percent reservation of all Pennsylvania land.

C. Restriction of Highway Access by Governmental Regulation Does Not Constitute a "Taking" in the Constitutional Sense

1. The limiting of appellees' highway access will serve to promote the public safety and welfare.

The Pennsylvania statute which the district court held to be unconstitutional indicates on its face that the legislative object is to facilitate the movement of highway traffic. §2(b). It cannot be gainsaid, we submit, that state officials charged with the maintenance of state roads might reasonably conclude that the flow of traffic will be speeded and, in addition, that accidents will be reduced by controlling access to a heavily traveled thoroughfare connecting a densely populated metropolitan area with a great modern airport.

The depositions[12] of Joseph Barnett, Assistant Deputy Commissioner of the United States Depart-

[12] The statements, originally in the form of affidavits attached to defendants' Motion for Summary Judgment (R. 24-31, 40-43), were by Stipulation of Counsel and Order of Court admitted to the Record as depositions (R. 83).

ment of Commerce, a pioneer in the development and designing of express highways, and of Donald M. McNeil, a Pittsburgh traffic engineer of vast experience, point out the manifold advantages of a limited, as contrasted with an unlimited, access highway: (1) the limited access highway permits traffic to flow without interruption; (2) the limited access highway does not lose its capacity to handle traffic; (3) the limited access highway accommodates a much greater volume of traffic (several times the number of vehicles per lane per hour); (4) the limited access highway minimizes the hazards of travel (over 50% reduction in accident and mortality rate); and (5) the limited access highway results in increased ease of driving, lower cost of motor vehicle operation and savings of man-hours.[13]

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[13] For a comprehensive discussion and bibliography of materials dealing with the purposes and functions of limited access highways, see Cunnyngham, *The Limited Access Highway*, 13 Mo. L. Rev. 19 (1948). See also Duhaime, *Limiting Access to Highways*, 33 Ore. L. Rev. 16 (1953). The substance of these articles is conveniently summarized in the following quotation: "Various studies have shown that the numerous entrances to the [unlimited access] highway, the frequent drawing in and out of the traffic stream, the parking, and the increased pedestrian traffic, all engendered by commercial use of the roadside, jointly conspire to reduce substantially the traffic capacity of the highway and to promote congestion, and to cause a large proportion of the highway accidents." Bowie, *Limiting Highway Access*, 4 Md. L. Rev. 219 (1940).

2. Highway regulations are particularly encompassed within the police power of the state.

> ". . . injury may often come to private property as a result of a legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation." (Emphasis by Court)
>
> *Chicago, B. & Q. Railway Company v. Illinois ex rel. Drainage Commissioners,* 200 U. S. 561, 584.

Similarly, in *New Orleans Public Service v. New Orleans,* 281 U.S. 682, 687 (1930), the Court stated: "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law [cases cited]."

If there be one area of the law where these precepts are particularly honored, it probably lies in the field of highway control. The especially wide latitude which is reposed in the states when dealing with their highways appears to rest upon the conviction that, as expressed in *South Carolina State Highway Department v. Barnwell Bros.,* 303 U.S. 177, 187 (1938), "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . The state has a primary and immediate concern in their

safe and economical administration."[14] The case at bar, as far as our research discloses, is the first instance in which a federal court has invalidated a state statute designed solely to promote highway safety and to facilitate the movement of highway traffic.

Private rights of access, like all private rights, are held and enjoyed subject to the paramount right of the public to regulate in the public interest. Particularly should this be true where the subject matter of the regulation is property, such as the Airport Parkway, which belongs to the public itself. See 1 Lewis, *Eminent Domain* (3rd Ed.), §120; Enfield & McLean, *Controlling the Use of Access*, National Academy of Sciences, National Research Council, Highway Research Board Bulletin 101 (1955), p. 70.[15]

In support of its conclusion that the limiting of appellees' highway access would constitute a taking of property, the lower court quoted from the opinion in *Donovan v. Pa. Co.*, 199 U.S. 279, 302 (1905). An ex-

[14] In like vein, the Supreme Court of Pennsylvania, in Commonwealth v. Funk, 323 Pa. 390, 394, 186 A. 65 (1936), asserted: "The plenary power of the legislature over the highways of the Commonwealth is of ancient standing, and seldom, if ever, has been questioned . . . Highways, therefore, being universally the property of the state, are subject to its absolute direction and control." See also Maurer v. Boardman, 336 Pa. 17, 7 A. 2d 466 (1939), aff'd Maurer v. Hamilton, 309 U. S. 598 (1940).

[15] See also Socony Vacuum Oil Co., Inc. v. Murdock, 165 Misc. 713, 1 N.Y.S. 2d 574 (1937) (refusal to permit construction of driveway); Calumet Federal Savings & Loan Association of Chicago v. City of Chicago, 306 Ill. App. 524, 29 N.E. 2d 292 (1940) (restriction of access by construction of curbings).

amination of the extract set forth in the district court's opinion will show that that case does not support the proposition for which it is cited, for the *Donovan* opinion clearly points out that an abutting owner's right of access is subject to "legitimate public regulation" and that a deprivation of property occurs only when the abutter is denied access "other than by the exercise of legitimate public regulation."

It may not be inapposite to emphasize here that what the state proposes to do is to limit, or even destroy, free access between the state's highways and the abutting land because such access has become inimical to the public safety and welfare. The state does not desire any right of access; it does not want, and will not acquire, either for itself or for the general public the right of access between the highway and the abutting property. In other words the aim of the state is merely to prohibit appellee's use of their property in such manner as to injure the public. Such action on the part of the state is, we submit, as proper an exercise of the police power as is the action of a municipality in designating a street to be one-way or in prohibiting parking on a designated thoroughfare or in creating a medial strip (or traffic park) through the center of a road. Although such actions may—and generally do—cause inconvenience to and impairment of the property values of abutting owners, we know of no case in which they have been held to constitute a taking of property.

3. Since governmentally erected physical impediments to access have been uniformly held not to constitute a "taking" in the constitutional sense, the same result should be reached where substantially the same effect is produced by governmental regulation.

Although limited access highways are of recent origin, the reports are replete with instances of governmentally imposed restrictions upon highway access—usually in the form of physical obstructions.[16] In the leading case of *Sauer v. City of New York*, 206 U.S. 536 (1906), the municipality, pursuant to state authority, constructed over a public street an iron viaduct resting upon iron columns placed in the roadway. The construction and maintenance of the viaduct impaired the plaintiff's access to his property abutting upon the street, as well as his light and air. Analogizing the facts to those in the change of grade cases,[17] this Court concluded that the interference with the plaintiff's access was not the result of a taking of his property and that he was not, therefore, constitutionally entitled to damages. If a physical improvement may be made in a public thoroughfare without conferring upon an adjacent property owner a right to damages for loss of access, there is no reason, we submit, why the same result should not follow from

[16] These cases are not to be confused with those involving private obstructions of access for private purposes since the access rights of abutters are generally recognized as superior to the use of the highway for non-highway purposes.

[17] See, for example, cases cited in Ettor v. City of Tacoma, 228 U.S. 148 (1913).

the enforcement of a state police regulation [18] having the same effect upon highway access.

In *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878), it was held that, although the action of a municipality in constructing a tunnel in a street upon which a tenant's property abutted may have deprived the tenant of access to his property, the municipality could not be held liable in damages under the Federal Constitution, the Court declaring:

> ". . . Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." [19]

As stated by the Court, the issue in *Delaware River Comm'n. v. Colburn*, 310 U.S. 419, 425 (1940), was "the right of respondents to recover consequential damages to their New Jersey land, due to interference

[18] Access here may be limited without the erection of physical barriers.

[19] See also Meyer v. Richmond, 172 U.S. 82 (1898) (erection by railway company of tracks, sheds and fences in street in front of plaintiff's property); S. B. Penick Co. v. N. Y. Cent. R. Co., 111 F. 2d 1006 (3rd Cir. 1940) (construction of viaduct on street in front of plaintiff's property); Marchant v. Penna. R. Co., 153 U.S. 380 (1894) (construction of elevated railroad in front of plaintiff's property); and Meade v. Portland, 200 U.S. 148 (1906) (closing of street and approach to river after wharves had been lawfully constructed by property owner in front of his land).

with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land." Although a New Jersey statute directed the commission to "establish . . . the damages for property taken, injured or destroyed," this Court, reversing the New Jersey Court of Errors and Appeals, held that such a provision did not require payment of consequential damages. The opinion cites numerous cases, many of them decided in Pennsylvania, which hold that consequential damages cannot be recovered where loss of access is inflicted by the erection of structures on public thoroughfares.

Similarly, in *U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945), this Court, after weighing the competing interests of the public and a riparian landowner, concluded that, where the action of the Federal Government in lowering the level of a river (without the acquisition of any land) adversely affected the capacity of the claimant's power plant, there was no taking of property under the Fifth Amendment [29] and thus no right to damages. Mr. Justice Jackson, speaking for the Court, reasoned as follows:

> "The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements

[29] Since both the Fifth and Fourteenth amendments protect, in substantially the same language, against deprivation of property without due process of law, the liability of a state under the Fourteenth Amendment should be no greater than that of the Federal Government under the Fifth. See U. S. ex rel. T.V.A. v. Powelson, 319 U.S. 266, 278-9 (1943).

so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only that result from a taking of property. . . . The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in nearly every state in the Union that 'there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law.'" (pp. 502, 510-11).

We have indicated that we can see no material difference between denial of access to a highway by erection of physical structures and denial of access by police regulation. In furtherance of that assertion we point out that there should be no difference in principle between governmental action which denies to an abutting property owner access to a public waterway and governmental action which denies to an abutting property-owner access to a public highway. The cases dealing with waterways are illustrative of the status of the law here applicable.

The farm of the plaintiff, in *Gibson v. U.S.*, 166 U.S. 269 (1897), fronted on the Ohio River, where plaintiff maintained a landing. This was the only means by which she could ship goods to and from her farm. Although a dike constructed by the United

States did not come into physical contact with the farm and did not throw water upon the plaintiff's land, the physical presence of the dike did prevent ingress and egress to and from the landing except at high tide. This handicap resulted in a substantial diminution in the value of the farm. In denying recovery, this Court held that the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or the direct invasion thereof, but was only the incidental consequence of the lawful and proper exercise of a governmental power.

The property owner in *Scranton v. Wheeler*, 179 U.S. 141 (1900), like the farm owner in the *Gibson* case, was deprived of access to navigability from his land by reason of the construction by the government of a pier in front of his property. In disallowing the plaintiff's claim to damages, the Court explained that the owner acquired the right of access subject to the contingency that this right might be destroyed by governmental action aimed at improving navigation.[21] The same reasoning, we submit, should apply in the case of a highway; for the interest of an abutting property owner in a highway would seem to be no greater than that of an abutting property owner in a waterway; and, surely, the interest of a state in improving transportation on a highway is no less than that of the United States in improving transportation on a waterway.

[21] For more recent cases applying the foregoing principle, see U. S. v. Commodore Park, 324 U.S. 386 (1945); U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592 (1941).

The physical obstruction cases are, we submit, of compelling significance. If the deprivation of access resulting from the erection, as a part of public works, of physical structures does not entitle an abutting property owner to damages, the accomplishment of a similar result without an actual erection of barriers should produce no different legal consequence; for it would be a simple matter for the state to erect such barriers so as to limit access to the road involved in the case at bar.

IV. A PENNSYLVANIA STATUTE PROVIDING FOR THE LIMITING OF ACCESS TO A PUBLIC HIGHWAY, WITHOUT LIABILITY ON THE PART OF THE STATE FOR PAYMENT OF CONSEQUENTIAL DAMAGES IN THE ABSENCE OF A TAKING OF PROPERTY, DOES NOT DEPRIVE AN ABUTTING LANDOWNER OR TENANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW OR DENY HIM THE EQUAL PROTECTION OF THE LAWS OR IMPAIR THE OBLIGATIONS OF HIS CONTRACTS

A. A State Is Not Constitutionally Required To Pay Consequential Damages Where No Property Is Taken

We have argued that the conversion of an unlimited access highway to a limited access highway does not constitute a taking of property. A rejection of this view, however, would not necessitate the invalidation of the Pennsylvana Limited Access Highways Act. Section 8, which the district court found to be constitutionally deficient, provides that: "The owner or owners of private property affected by the construction or designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken." Nothing in this language purports to relieve the state of its constitutional obligation to pay damages where property is taken.

To the contrary, the section specifically provides that damages shall be allowed a property owner where there is "an actual taking of property." Thus, if the district court is correct in holding that the limiting of highway access constitutes a taking of appellees' property, this statute on its face requires payment of damages therefor. Appellants have never argued otherwise;[22] no court has ever decided otherwise.

That the limitation of access to the Airport Parkway might work a hardship upon appellees or lessen the value of their land or impair existing or contemplated uses thereof does not in itself impose upon the state the duty to pay compensation. Such losses are merely what the law describes as consequential. In holding that the government is not liable for the payment of such damages, this Court in *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 510 (1923), explained:

> "The conclusion to be drawn from those and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. [case cited]. If, under any power, a

[22] Included in the Record certified to this Court, but not printed, are transcripts of the entire argument before the district court on all phases of this case. An examination of the transcripts will reveal that the defendants at all times contended that the Legislature intended the provisions of the challenged statute to be as broad as, but no broader than, the constitutional requirement. Although defendant's counsel did argue, to the same effect as here, that plaintiffs are not constitutionally entitled to damages, he did not contend or concede that the Pennsylvania Supreme Court would so hold.

> contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." (Emphasis in original)

Relying upon the *Omnia Commercial* case, this Court in *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943), reaffirmed the constitutional principle in the following language:

> ". . . not all losses suffered by the owner are compensable under the Fifth Amendment. In the absence of a statutory mandate [case cited] the sovereign must pay only for what it takes, not for opportunities which the owner may lose. . . . It is well settled in this Court that, 'Frustration and appropriation are essentially different things.'" (pp. 281-2)

To the same effect, see *Campbell v. U.S.*, 266 U.S. 368 (1924); *U.S. v. Petty Motor Co.*, 327 U.S. 372, 377-8 (1946); *U.S. v. Cox*, 190 F. 2d 293 (10th Cir. 1951), cert. denied 342 U.S. 867 (1951).

Although the district court attached considerable significance to the business loss which would attend the issuance of the declaration of limited access (R. 99), it is established that such loss is not an element of just compensation in the absence of a statute expressly allowing it. *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923); *Mitchell v. U.S.*, 267 U.S. 341 (1925). Cases have held that a state or a political subdivision thereof may constitutionally go even as far as to prohibit, in specified areas, objectionable business activities (whether or not tradi-

tionally considered nuisances) without liability for the payment of compensation, despite the fact that the conduct of the business may have been lawful at the time of its inception. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (livery stable); *Cusack Company v. City of Chicago*, 242 U.S. 526 (1917) (billboards); *Standard Oil Co. v. City of Tallahassee*, 183 F. 2d 410 (5th Cir. 1950) (gasoline station).

B. The State Is Not Here Estopped

The district court's opinion refers to, but does not consider, plaintiff's argument of estoppel, arising from the allegation (para. 3 of the complaint, R. 12) that, at the time of the original condemnation of land for the Airport Parkway, the County of Allegheny (a political subdivision of the Commonwealth) argued that, in the determination of the damages sustained by the members of the plaintiff class, consideration should be given to the benefits which the plaintiffs would derive from their enjoyment of highway access.

In point of fact the evidence does not sustain plaintiffs' position in this respect. The excerpts reprinted in the Record, 45-64, indicate that, while the County of Allegheny advanced this argument in the cases which were then litigated—and many of the appellees herein had no involvement, direct or derivative, in those proceedings—that contention was strongly disputed by the property owners. The condemnation occurred in 1949 (R. 45). It is not unlikely that the property owners were then aware of the Pennsylvania

Limited Access Highways Act, enacted several years before; and, consequently, the possibility that highway access might at some future date be limited was a factor which should have been, and undoubtedly was, considered in the adjudication of the plaintiffs' damages.

No constitutional infirmity and no obligation to pay consequential damages arises from the fact that the state may undertake now to declare the Airport Parkway a limited access highway after having permitted its use as an unlimited access highway heretofore. A more extreme case was *Reichelderfer v. Quinn*, 287 U.S. 315 (1932), in which a property owner, who had been assessed for special benefits supposedly accruing from the proximity of his property to a public park, sought to enjoin the Commissioners of the District of Columbia from carrying out an act of Congress directing the building of a fire engine house in the park. A prior act of Congress had dedicated the land perpetually for use as a park. It was admitted that the presence of a fire engine house would depreciate the value of the plaintiff's property. In denying the plaintiff relief, this Court asserted:

> "It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority [cases cited].

> . . . But in such cases no private right is infringed. . . . For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise." 287 U.S. 315, 318-9.

Thus, that property owner could not invoke an estoppel against the sovereign even though the sovereign had assessed him for benefits which it later destroyed.

Plaintiffs in the case at bar allege (para. 3 of the complaint, R. 12) the reverse situation, viz., that the damages allowed them at the time of the condemnation of their properties for the construction of the road were diminished by the future benefits which it was believed would result from their unrestricted access to the highway. In rejecting this type of argument in the *Reichelderfer* case, the Court declared: "The possibility that the United States might, at some later date, rightfully exercise its power to change the use of the park lands, so far as it affected present value, was a proper subject for consideration in valuing the benefits conferred"[23] (287 U.S. 315, 323). Similarly, the possibility that the Commonwealth of Pennsylvania might, at some later date, rightfully exercise its power to limit access to the highway, insofar as it affected plaintiffs' property interests, was a proper subject for consideration in determining their damages.

[23] See also People v. Sack, 202 Misc. 571, 110 N.Y.S. 2d 556 (1952).

The estoppel argument appears to rest in part upon the implied, if not expressed, contention that appellees have a vested right to unlimited highway access by reason of the fact that their various business enterprises were launched at a time when access to the highway was unrestricted. What we submit to be a fair paraphrase of their contention demonstrates the fallacy. In constructing the road in question, the Commonwealth acted to speed the flow of traffic to the airport; the Commonwealth did not undertake to assure abutting landowners an uninterrupted right to make money out of the traveling public.

C. The Limiting of Highway Access Will Not Deny Appellees the Equal Protection of the Laws

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The district court's opinion mentions, but does not discuss, appellees' contention that the Limited Access Highways Act denies them the equal protection of the laws. This argument appears to rest upon the supposed unfairness arising from (a) the fact that owners of property abutting upon the Pennsylvania Turnpike and other newly constructed highways are permitted by law to receive consequential damages and (b) the provision of §8 of the challenged statute authorizing the Commonwealth to share the expense of property damages with its political subdivisions.

Like the due process clause, the equal protection clause of the Fourteenth Amendment has never been interpreted as a limitation upon the legitimate exercise of the state's police powers. *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U.S. 556 (1894). Furthermore, the

prohibition is not directed against reasonable legislative classification and does not invalidate the reasonable imposition, upon one class, of restraints not imposed upon another. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935). See also *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Missouri Pac. R. Co. v. Mackey*, 127 U.S. 205 (1888). It is perhaps supererogatory to note that, actually, the restrictions which a limited access highway would impose upon appellees are no greater than would be imposed upon any others since all persons would be equally limited in their access to the road.

Owners of property abutting upon the Turnpike and other roads are entitled under Pennsylvania law to recover consequential damages resulting from an actual taking of their property. The statute involved in this proceeding does not purport to authorize less; it merely proscribes the payment of consequential damages where there is no taking of property. The difference, in practice, is between consequential loss flowing from a taking of property[24] and consequential loss resulting from the exercise of the state's police powers without a taking. The distinction, we submit, is of sufficient legal breadth to justify a difference in legal consequence. In any event, we fail to perceive how the state's generosity in one instance can result in the imposition upon it of a constitutional obligation of perpetual generosity thereafter.

The provision of the act in question authorizing the Commonwealth to share the cost of property damages

[24] In the case of the Turnpike, the limiting of access was coincident with the initial condemnation of land for the road.

with its political subdivisions does not in any way affect the liability of the Commonwealth, but merely establishes a method by which the Commonwealth can share in the liability of these subdivisions.[25] In this respect the procedure is no different from that followed under other Pennsylvania statutes. See, for example, Act of June 1, 1945, Pamphlet Laws 1242, §523, as amended, 36 Pa. Stat. Ann. §670-523.

D. The Limiting of Highway Access Will Not Unconstitutionally Abridge Appellees' Obligations of Contract

The district court's opinion notes, but does not discuss, appellees' contention that the enforcement of the Limited Access Highways Act would abridge their obligations of contract. This argument apparently stems from the fact that some of the appellees are tenants occupying abutting property under leases from the owners thereof.

It is well established that Art. I, §10, cl. 1, of the Constitution, which forbids a state to pass any law impairing the obligation of contract, does not restrict a state in the proper exercise of its police powers. *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). As was stated in *Manigalt v. Springs*, 199 U.S. 473, 480 (1905):

[25] The liability of political subdivisions of the Commonwealth under Art. XVI, §8, of the Constitution of Pennsylvania is broader than that of the Commonwealth under Art. I, §10, since the former, but not the latter, are liable for damages arising from an injury or destruction to property, as well as from a taking.

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Accord: *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Chicago and Alton R. R. Co. v. Tranbarger*, 238 U.S. 67 (1915); *N. Y. & N. E. R. R. v. Bristol*, 151 U.S. 556 (1894).

That contracts relating to the use of highways or abutting property are in no special category under the contract clause is evident from *Sproles v. Binford*, 286 U.S. 374 (1932), in which it was held that "contracts which relate to the use of highways must be deemed to have been made in contemplation of the regulatory authority of the State." Cf. *Stephenson v. Binford*, 287 U.S. 251 (1932).

CONCLUSION

For the foregoing reasons, the final decree of t district court should be reversed, the injuncti against appellants should be dissolved, and judgme should be entered in favor of appellants.

Respectfully submitted,

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APPENDIX "A"

LIMITED ACCESS HIGHWAYS ACT

Authorizing the establishment, construction and maintenance of limited access highways and local service highways; and providing for closing certain highways; providing for the taking of private property and for the payment of damages therefor; providing for sharing the costs involved and for the control of traffic thereover; providing penalties, and making an appropriation.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. A local service highway is defined as a public highway, either existing, or new, or combination thereof, paralled or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway.

Section 2. (a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to

declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway.

(c) The authorities of any political subdivision of the Commonwealth are hereby authorized to declare any existing or new highway, or part thereof, now or hereafter under their jurisdiction and control, to be a limited access highway and to construct and maintain the same.

(d) The designation of a limited access highway in a city by either the Secretary of Highways or by the commissioners of the county in which the city is located shall be subject to the approval of the city as evidenced by an ordinance duly passed in accordance with the law. Such approval by a city shall in no way impose any liability upon the city for property damages occasioned by the designation of a limited access highway.

Section 3. The Secretary of Highways with the approval of the Governor, or local authorities in connection with the designation or construction of a limited access highway may lay out or construct local service highways. Such local service highways shall be so located as to permit the establishment by private

owners or their lessees of adequate fuel and other service facilities for the users of limited access highways. The location of such facilities may be indicated to the users of the limited access highways by appropriate signs, the size and location of which shall be determined by the authorities having jurisdiction. No commercial enterprise or activity shall be located or authorized by the State or by any political subdivision thereof, within or on any public property which is part of the right of way of any limited access highway.

Section 4. In the establishment or construction of limited access highways, the authorities responsible therefor shall have the power to eliminate intersections at grade with other highways, by the construction of grade separation structures, by the closing of such intersecting highways at the right of way lines of the limited access highway, or by relocating such intersecting highways as in their discretion will best serve the public interest.

Section 5. Where the Secretary of Highways proceeds under the authority of this act, he shall have authority to construct and maintain any tunnel, bridge, culvert, drainage structure or other structure or appurtenances incidental thereto, other than sanitary sewers, as may be necessary in the construction of the limited access highway: Provided, however, That the Secretary of Highways shall have authority to replace, reconstruct or restore existing sanitary sewers.

Section 6. The establishment of a limited access highway or a local service highway by the Secretary

of Highways, as herein provided, shall be by a plan approved by the Governor and filed in the office of the recorder of deeds of the proper county, at the expense of the county. The establishment of a limited access highway or a local service highway by the authorities of any political subdivision of the Commonwealth, as herein provided shall be in the same manner as now or hereafter provided by law for the opening, widening or relocating of highways by such political subdivision.

Section 7. After the establishment of a limited access highway it shall be unlawful to establish or lay out any new highway intersecting the limited access highway except by and with the consent of the authorities responsible for the limited-access highway.

Section 8. For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an ac-

tual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the authorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivisions in which such highway is located.

Section 9. The authorities responsible for the maintenance of limited access highways shall have exclusive jurisdiction over the control of the use of such highways, and, by the erection of appropriate signs, may control the ingress and egress of vehicles thereto, therefrom and across, and the parking and speed of vehicles thereon, or may exclude any class or kind of traffic therefrom, and, by the erection of signs or the construction of curbs, painted lines, or other physical separations, provide separate traffic lanes for any class of traffic or type of vehicle: Provided, however, That nothing herein contained shall restrict the authority or jurisdiction of any peace officer as defined in The Vehicle Code from enforcing such control over traffic or parking as have been or may be established for limited access highways: And provided further, That the provisions of The Vehicle Code not superseded by the provisions of this act shall be and remain

in full force and effect for the use and operation of motor vehicles on limited access highways. It shall be unlawful for any person to violate any parking or speed restriction or traffic control established for a limited access highway as provided herein, and any person violating such restriction or control shall, in a summary proceeding, be subject to a fine of not less than five ($5) dollars nor more than twenty-five ($25) dollars and costs of prosecution or imprisonment for one day for each dollar of fine and costs remaining unpaid.

Section 10. Maintenance of a limited access highway shall include the removal of snow, the maintenance of curbs, shoulders, ditches and slope areas and may include the lighting of the highway or any part thereof and the planting and trimming of trees, grasses, shrubs and vines on the right of way or slope areas.

Section 11. It shall be lawful for any political subdivision of the Commonwealth to make a contribution to the Department of Highways toward the cost of the establishment or improvement of a limited access highway or local service highway by the Department of Highways or toward the cost of maintenance of a limited access highway by the Department of Highways. It shall be lawful for any county and any of its political subdivisions to enter into agreements for the sharing of any or all costs of the establishment or improvement of limited access highways and local service highways.

Section 12. Local service highways constructed under authority of this act shall, upon completion of

construction, be maintained by and at the expense of the political subdivision in which they are located.

Section 13. Except as herein provided, the powers granted under the provisions of this act shall not change, alter or diminish any authority or right now or hereafter vested by law in the Secretary of Highways or the officials of any political subdivision of the Commonwealth relating to highways.

Section 14. So much of the money in the Motor License Fund as may be necessary from time to time is hereby specifically appropriated to the Department of Highways for carrying out the provisions of this act. The political subdivisions of the Commonwealth are authorized to provide funds for the establishment, construction or maintenance of limited access highways or local service highways in the same manner as now or hereafter provided by law for the improvement or maintenance of highways.

Section 15. The provisions of this act are severable, and if any of its provisions shall be held to be unconstitutional by any court of competent jurisdiction, the decision of the court shall not affect or impair any of the remaining provisions of this act.

Approved—the 29th day of May, A.D. 1945.

EDWARD MARTIN